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No. 89-867

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In the Supreme Court of the United States

OCTOBER TERM, 1989

F. & H. R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM, ET AL., PETITIONERS

v.

HARZA ENGINEERING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the act of state doctrine required dismissal of this suit.

2. Whether the courts below were required, prior to ruling on the act of state issue in this case, to solicit the views of the Executive Branch concerning the impact of the decision on the foreign relations of the United States.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In the 1960s, respondent Harza Engineering Company contracted with the Government of Iran to provide engineering services for water and power projects in Iran. Under the contract, respondent was required to associate with an Iranian engineering firm. Accordingly, on October 1, 1964, respondent entered into a collaboration agreement with petitioner Farman-Farmaian Consulting Engineers Firm (Consulting Firm), which was to represent respondent in negotiations with the Iranian Government, provide local staff and facilities at regional offices, and perform emergency services in the Teheran office.

Under the agreement, all services by the Consulting Firm were to be performed in Iran, all invoices for those services were to be sent to respondent's office in Teheran with copies to Harza's

Chicago office, and payments were to be made in Iranian rials through Iranian banks. The Consulting Firm was not, however, entitled to receive payment for its services until Harza first received payment from the Iranian Government. Petitioner Farough Farman-Farmaian, the managing director of the Consulting Firm, subsequently pressed to have a small portion of the payments made in dollars and attributed to "work outside Iran," presumably to avoid Iranian taxes. In addition, he occasionally visited respondent's Chicago offices to discuss the projects while he was visiting his children in the United States. Most payments, however, were made to Farough Farman-Farmaian in rials through Iranian banks in which Harza maintained accounts, and all financial records relating to payments in rials were maintained in Harza's office in Iran. Pet. App. 2a-3a, 16a-17a, 25a-27a.

Work on the various construction projects continued throughout the 1970s. In 1978, just prior to the Iranian revolution, petitioner Farough Farman-Farmaian left Iran. He now resides in London. In 1979, the new Government of Iran enacted a Temporary Directors Act, which provided for appointment of temporary directors for Iranian companies if the directors had abandoned their company or could not be reached or if the company had suspended its work. Under the Act, the Iranian Government, beginning on August 6, 1979, appointed a series of temporary directors for the Consulting Firm. Those directors were vested with full authority to manage the Firm's affairs, to the exclusion of petitioner Farough Farman-Farmaian. Pet. App. 17a, 19a & n.1. In 1980, the Government of Iran adopted an "Act Concerning the Management and Ownership of Shares of Contracting and Consulting Firms," which authorized a cabinet-level commission to determine which such Iranian firms should be continued or dissolved. The commission decided that the Consulting Firm should be dissolved, and it appointed a Board of Liquidators for that purpose in January 1982. During the period of liquidation, which apparently has not been completed (*id.* at 18a, 22a), the Board of Liquidators enjoys full and exclusive authority over the Consulting Firm, including all rights to bring lawsuits on its behalf. *Id.* at 17a.

Respondent ceased its operations in Iran in 1980 because the Iranian Government failed to pay for services rendered on the water and power projects. In 1986, respondent received an award of $8,416,805.86 for this work from the Iran-United States Claims Tribunal. Pet. App. 18a; see *Harza* v. *Iran*, 11 Iran–U.S. Claims Trib. Rep. 76, 137 (1986).

2. In 1987, petitioners commenced this suit against respondent in the United States District Court for the Northern District of Illinois, seeking approximately $2 million for services rendered by the Consulting Firm in connection with the work that formed the basis of the Tribunal's award to respondent. Petitioner Farough Farman-Farmaian sued on his own behalf and on behalf of the other owners of the Consulting Firm, who gave him power of attorney to prosecute this suit. Invoking the court's alien diversity jurisdiction, 28 U.S.C. 1332(a)(2), petitioners stated claims for breach of contract and unjust enrichment. Pet. App. 2a, 15a-16a.

a. The district court granted respondent's motion to dismiss the complaint. Pet. App. 16a-28a. It first held that petitioner Farough Farman-Farmaian had been divested of his capacity under Iranian law to sue on behalf of the Consulting Firm, rejecting his contention that the actions of the Iranian Government did not comply with the Iranian Constitution and laws. *Id.* at 18a-23a.[1]

The court further held that the actions of the Iranian Government must be given effect under the act of state doctrine. Pet. App. 23a-28a. The court recognized that the doctrine requires a United States court to give effect only to the acts of a foreign sovereign "within its own territory," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964), and that a United States court should not give effect in the United States to a foreign confiscatory decree because to do so would be inconsistent with the public policy of this Nation against uncompensated takings of private property. Pet. App. 23a-24a. But the court concluded that these principles would not be violated if the actions of the

[1] Petitioners no longer challenge the actions of the Iranian Government under Iranian law. See Pet. 12-13.

Iranian Government under its 1979 and 1980 laws were given effect as the rule of decision in this case, because "all of the functional elements of the relationship [between the parties] were centered in Iran," and therefore "Iran was in a position to 'perform a *fait accompli*' over the payment or receipt of any money owed the [Consulting Firm] by [respondent]." *Id.* at 26a (citing *Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333, 1338 (9th Cir. 1985), and *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir.), cert. denied, 393 U.S. 924 (1968)).

The court found it especially significant that respondent had not been paid by Iran at the time of the expropriation and did not receive payment until 1986 (through the Iran-United States Claim Tribunal). Because the Consulting Firm was not entitled to compensation under its contract with respondent until respondent first received payment from Iran, the Consulting Firm's entitlement to compensation for its services "did not mature until *after* the expropriation and *after* the [Consulting Firm] was controlled by the government." Pet. App. 27a. The court could "find little difference between this and those cases wherein the claim for which payment is sought was created by the shipment of goods *after* the expropriation occurred. In those cases, the claim is deemed to belong to the expropriated company that shipped the goods." *Ibid.*

Against this background, the court summarized its reasons for concluding that "[t]he principles underlying the Act of State doctrine require that it be invoked under the circumstances of this case": "[t]he United States has no connection to the relationship between the parties except that Harza has an office here": "[t]he contract claim on which Farough sues matured entirely in Iran after the expropriation of the [Consulting Firm]"; respondent "had no property or assets of the [Consulting Firm] within the United States, and * * * the government of Iran acquired all rights to claim or sue for property or assets owed by [respondent] to the [Consulting Firm] arising from the subcontract for services in Iran." Pet. App. 27a-28a.

b. The court of appeals affirmed, Pet. App. 1a-11a, agreeing with the district court that the act of state doctrine barred

petitioners' claims. *Id.* at 8a-11a.[2] The court rejected petitioners' contention that the extraterritoriality exception to that doctrine permitted adjudication of their claims. It reasoned that "the confiscation was complete within the foreign state in the sense that all of the [Consulting Firm's] assets and operations were there"—including "the firm's claim against Harza for payment for the services that the firm had rendered Harza in Iran." *Ibid.* The court relied upon the Ninth Circuit's decision in *Tchacosh*, which "rejected the extraterritoriality exception to the act of state doctrine on facts almost identical to those of the present case." *Id.* at 9a. The court also distinguished two Second Circuit decisions cited by petitioners, *Bandes* v. *Harlow & Jones, Inc.*, 852 F.2d 661 (1988), and *United Bank Ltd.* v. *Cosmic International, Inc.*, 542 F.2d 868 (1976), on the ground that "in each a shipment of goods to or from the U.S. was contemplated," while in the instant case, "all the services under the contract were to be performed in the foreign country." Pet. App. 8a-9a.

The court acknowledged that its description of the Consulting Firm's claim for payment of respondent's debt as an asset located in Iran "may be thought to beg the question." But it regarded the converse proposition—that the "debt was 'in' Chicago"—as "untenable," since it would be "strange to describe the Consulting Firm as having an 'American' asset by virtue merely of having a claim against an American company for services performed on that company's behalf in Iran." Pet. App. 9a. The court also thought that the latter proposition "would if accepted greatly reduce the accepted scope of the act of state doctrine," since a "dispute between an Iranian corporation doing business entirely in Iran, and the government of Iran, could pop up in an American court merely because the corporation was owed some money by an American firm." *Id.* at 9a-10a. The court instead believed it was necessary to look to

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[2] In disposing of a threshold question of diversity jurisdiction, Pet. App. 6a-8a, the court accepted the "principle * * * that corporations expropriated abroad continue to exist with capacity to sue in the United States, provided * * * they can show that the court can disregard the expropriation without violating the act of state doctrine." *Id.* at 7a. Respondent does not question that principle.

"the interest which underlies the extraterritorial exception to the act of state doctrine"—namely, the "independent concern [of the United States] with protecting property and transactions * * * within its borders." *Id.* at 11a. "That interest," the court concluded, "is not present here." *Ibid.* Nor did the court believe that a contrary result was required because of the possibility that respondent might realize a windfall. The court first noted that any such windfall was speculative, because respondent did not concede that it was indebted to anyone and the liquidators in Iran might still make a claim against respondent. But the court stressed that it was not in any event authorized "to disregard an act of the Iranian state against an Iranian firm the contemplated and actual operations of which were confined to Iran, which [firm] had no assets outside of Iran, and which was seized in Iran pursuant to locally valid Iranian law." *Ibid.*

DISCUSSION

The courts below reasonably concluded that petitioners' suit, based on the Consulting Firm's contract claim arising in Iran for services performed there, is barred by the act of state doctrine. The decision below does not conflict with any decision of this Court or any other court of appeals. To the contrary, it is fully consistent with and relies upon *Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333 (9th Cir. 1985), the only other decision of a court of appeals to have addressed the "extraterritorial exception" to the act of state doctrine in similar circumstances. The lower courts are generally resolving questions concerning the territorial reach of the act of state doctrine in a consistent manner that comports with the underlying purposes of the doctrine. Those questions therefore do not warrant review at this time.

1. a. The act of state doctrine requires courts in the United States to "deem[ ] valid" and apply as the " 'rule of decision' " in cases before them the "acts of foreign sovereigns taken within their own jurisdictions." *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 110 S. Ct. 701, 705, 707 (1990) (quoting *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 310 (1918)). Put another way, the doctrine "precludes the courts of this country from inquiring into the validity of the public acts [of] a

recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). See also *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 706 (1976) (plurality opinion); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). The act of state doctrine has been variously described as "resting upon 'the highest considerations of international comity and expediency,' " as well as the "domestic separation of powers, reflecting the 'strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *Kirkpatrick*, 110 S. Ct. at 704 (quoting *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-304 (1918), and *Sabbatino*, 376 U.S. at 423). In short, the doctrine "effectuate[s] general notions of comity among nations and among the respective branches of the Federal Government." *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (plurality opinion).

The Court's formulations of the act of state doctrine have consistently included a limiting principle of territoriality. That is, in order to be recognized as binding upon the judiciary, the act of a foreign sovereign must be complete within its own territory. *Kirkpatrick*, 110 S. Ct. at 704; *Sabbatino*, 376 U.S. at 401; *Underhill*, 168 U.S. at 252. This limitation is consistent with the doctrine's underlying purposes and rationale. Principles of international comity supporting application of foreign law in other settings weigh far less heavily when the foreign sovereign act purports to affect property situated in the United States and presumptively subject to its laws and public policies, including those prohibiting uncompensated takings. Similarly, " '[t]he obvious inability of a foreign state to complete an expropriation of property beyond its borders reduces the foreign state's expectations of dominion over that property,' " and "[c]onsequently, the potential for offense to a foreign state is reduced, as well as the need for judicial deference to other branches of government." *Tchacosh*, 766 F.2d at 1337 (quoting *Maltina Corp.* v. *Cawy Bottling Co.*, 462 F.2d 1021, 1028 (5th Cir.),

cert. denied, 409 U.S. 1060 (1972)); see Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 Colum. L. Rev. 594, 605-610 (1986).

By virtue of this limitation on the act of state doctrine, when the act of a foreign sovereign purports to affect legal relationships or property in the United States, a United States court will give effect to that act as a rule of decision only if the act is "consistent with the policy and law of the United States." *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966) (quoting Restatement of Foreign Relations Law § 46 (Proposed Official Draft 1962)). See also *Bandes* v. *Harlow & Jones, Inc.*, 852 F.2d 661, 666-667 (2d Cir. 1988); *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1121 & n.29 (5th Cir. 1985). Accordingly, if a foreign sovereign purports to expropriate property in the United States without payment of compensation, the act of state doctrine is inapplicable and the expropriation ordinarily will not be given effect by a United States court (because it is inconsistent with the public policy embodied in the Just Compensation Clause of the Fifth Amendment). *Bandes*, 852 F.2d at 667; *Republic of Iraq*, 353 F.2d at 51; *Vladikavkazsky Ry.* v. *New York Trust Co.*, 263 N.Y. 369, 378, 189 N.E. 456, 460 (1934).[3]

Petitioners contend (Pet. 6-16) that the court of appeals in this case violated the territorial limitation on the act of state doctrine by giving effect to Iran's expropriation of the Consulting Firm insofar as the expropriation applied to the Firm's

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[3] This is not an absolute rule. In *United States* v. *Belmont*, 301 U.S. 324 (1937), and *United States* v. *Pink*, 315 U.S. 203 (1942), the Court gave effect to the Litvinov Agreement, under which the United States, as an incident to the recognition of the Soviet Union, procured an assignment of the Soviet Union's claim to assets in the United States belonging to nationalized Russian companies; those assets were to be used to pay the claims of United States nationals whose property in the Soviet Union had been confiscated. In *Republic of Iraq*, the Second Circuit explained the result in *Belmont* and *Pink* on the ground that the President's actions, pursuant to his constitutional authority to conduct the foreign relations of the United States, made the Soviet expropriation decrees consistent with the law and policy of the United States from that time forward. 353 F.2d at 52.

claim against respondent.[4] Their argument proceeds as follows: the property at issue here is the "debt" respondent allegedly owes the Consulting Firm for services the latter performed in Iran; the situs of that debt is Chicago because that is where respondent's offices are; and the Iranian decree expropriating the Consulting Firm could not reach that property because it is not in the territory of Iran. In petitioners' view (Pet. 6-11), the Seventh Circuit's failure to adopt this reasoning places it is "irreconcilable conflict" with decisions of the Second and Fifth Circuits. We disagree. The decision below represents, in our view, a reasonable application of the territorial component of the act of state doctrine and presents no "irreconcilable conflict" with other cases.

b. In many—perhaps most—situations, the situs of property for purposes of the act of state doctrine will be clear. Certainly that is so in the case of real property, and usually of tangible personal property as well. Some intangible personal property may present more difficult problems because "[t]he situs of intangible property is about as intangible a concept as is known to the law." *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir.), cert. denied, 393 U.S. 924 (1968). Nevertheless, established law and custom provide concrete guidance for some such property. For example, trademarks consistently "have been held to be strictly territorial in the state of registry, so that former owners of marks registered in the United States could claim rights to them against those claiming under an act of a foreign state." Restatement (Third) of Foreign Relations Law § 443, reporters' note 4, at 375-376 (1986); *Maltina*, 462 F.2d at 1026; *Baglin* v. *Cusenier Co.*, 221 U.S. 580, 594-597 (1911). For other types of intangible property, it may be necessary to take account of the course of dealing between the parties, the nexus of the transaction to the United States and the foreign state, and the purposes underlying the act of state doctrine. This approach is consistent with this Court's

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[4] Both parties and the courts below have regarded the Iranian Government's actions in divesting the prior owners of authority over the Consulting Firm and subsequently dissolving it as effecting an expropriation of the Firm. Pet. i, 3; Br. in Opp. i, 6; Pet. App. 3a, 27a. We shall do the same.

refusal in *Sabbatino* to lay down an "inflexible and all-encompassing rule" for resolution of all act of state cases. 376 U.S. at 427-428. Under this approach, the courts have developed workable rules and principles for addressing the territorial component of the act of state doctrine as applied to particular categories of intangible property, such as bank deposits and funds or accounts receivable that are tied directly to goods shipped to or from the United States. See pages 15-16, *infra*.

The particular type of intangible property at issue in this case is an unliquidated claim for breach of contract or unjust enrichment based on services rendered in a foreign country. As a matter of Iranian law, the expropriation of the Consulting Firm prevents the Firm (and petitioner Farough Farman-Farmaian on its behalf) from prosecuting that claim. If the expropriation decree is regarded as operating solely on the *claim*, it would be reasonable to conclude that the act of state doctrine applied. The territorial limitation on that doctrine would not be triggered because a nation ordinarily may exercise sovereign authority over the claims of its own nationals against foreign parties, see *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981),[5] and the "situs" of such a claim for act of state purposes therefore could properly be deemed to be the domicile of the claimant, which in this case is in Iran. Petitioners, however, believe that the question of territoriality should be viewed not from the perspective of the party that owned the claim (the Consulting Firm), but from the perspective of the party that allegedly is liable on the claim (respondent). In petitioners' view, that liability should be regarded

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[5] In *Dames & Moore*, the Court sustained the President's settlement of the claims of United States nationals against Iran through the establishment of the Tribunal, 453 U.S. at 675-688, and it treated those claims as a species of property protected by the United States Constitution, *id.* at 688-690, even though, under petitioners' theory, the property in question might as easily have been regarded as the "debts" owed by Iran on those claims – property that, in petitioners' view, would have a situs in Iran. Any rules of situs fashioned by the courts for purposes of the territorial component of the act of state doctrine must preserve the constitutional authority of the President or Congress to act upon the foreign claims of United States nationals as they have done in the past and to insist that those acts by the United States are respected by other nations.

as a "debt," [6] and the situs of the debt should be deemed to be the domicile of the "debtor"—in this case, Chicago, where respondent has its offices. Under this theory, the Iranian decree purported to expropriate property whose situs was outside the territory of Iran, and it therefore cannot be given effect under the act of state doctrine.

As is evident, these two views of the territorial issue—one focusing on the claim, the other on the debt—are opposite sides of the same coin. We believe that to adopt one view or the other as an unyielding rule governing all cases could, in some circumstances, defy common sense and accord insufficient weight to the purposes of the act of state doctrine. We therefore are reluctant to endorse an inflexible rule that looks only to whether the "debtor" is domiciled in the United States. In fact, in the cases upon which petitioners rely, there were aspects of the transaction—in addition to the domicile of the "debtor"—that had a substantial nexus to the United States. See pages 15-16, *infra*. By contrast, in this case, where such further contacts in the United States are lacking, there is much force to the court of appeals' common sense observation that "it is strange to describe the Consulting Firm as having an 'American' asset by virtue merely of having a claim against an American company for services performed on that company's behalf in Iran." Pet. App. 9a. That result is not compelled either by precedent or by the purposes of the act of state doctrine.

c. In seeking to "localize" the situs of a debt for act of state purposes, some decisions have expressed the view that "a debt is not located within a foreign state unless that state has the power to enforce or collect it." *Menendez* v. *Saks & Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), rev'd on other grounds *sub nom. Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, (1976). Accord *Bandes*, 852 F.2d at 667; *United Bank Ltd.* v. *Cosmic Int'l, Inc.*, 542 F.2d 868, 873 (2d Cir. 1976); *Republic of Iraq*, 353 F.2d at 51. Because the "power to enforce

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[6] Compare *Pennsylvania Dep't of Public Welfare* v. *Davenport*, No. 89-189 (May 29, 1990), slip op. 4 (quoting 11 U.S.C. 101(11) (for purposes of the Bankruptcy Code, "debt" means "liability on a claim")).

payment of a debt * * * generally depends on jurisdiction over the person of the debtor" (*Menendez*, 485 F.2d-at 1365, citing *Harris* v. *Balk*, 198 U.S. 215 (1904),[7] and Restatement (Second) of Foreign Relations Law § 43, comment d (1965)), these cases have usually found the situs of the debt to be the "situs" of the debtor.

The Fifth Circuit crafted a somewhat different formulation in *Tabacalera*: whether the foreign government "was * * * physically in a position to perform a *fait accompli*" with respect to the transaction—*i.e.*, whether the act at issue "is an accomplished fact, that is when [the foreign government] has the parties and the *res* before it and acts in such a manner as to change the relationship between the parties touching the *res*." 392 F.2d at 715. See also *United Bank*, 542 F.2d at 874; *Maltina*, 462 F.2d at 1028. In these cases, the courts found that the act of state could not "come to complete fruition within the dominion of the [foreign state]" (*Tabacalera*, 392 F.2d at 715-716) and that the foreign sovereign therefore was not in a position to "perform a *fait accompli*" with respect to the intangible at issue. The result in these cases was generally consistent with a rule locating the situs at the domicile of the defendant-debtor.

However, contrary to petitioners' assertion (Pet. 10), the Second and Fifth Circuits have not inflexibly adhered to either the analytical approach or the debtor-oriented result petitioners urge. For example, in *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1123 (1985), the Fifth Circuit determined that strict adherence to its "*fait accompli*" formulation in the context of a foreign state's seizure of the assets of its own debtor-bank would unduly expand the act of state doctrine beyond what *Tabacalera* had intended, because "the act of state doctrine would apply whenever a foreign state seized assets owed by its bank, no matter how many ties the debts had to this country." *Ibid.* The court instead focused on whether the relationship between the parties' obligations and the foreign sovereign was "sufficiently close"

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[7] The due process holding in *Harris* v. *Balk*, though not its debt-situs analysis, has been substantially overruled by *Shaffer* v. *Heitner*, 433 U.S. 186, 212 n.39 (1977). See *Burnham* v. *Superior Court*, No. 89-44 (May 29, 1990) slip op. 13-16 (plurality opinion).

to warrant recognition of the foreign sovereign act, concluding that "the proper test for determining situs is where the incidents of the debt, as a whole, place it." The court then looked to various factors ("place of payment, intent of the parties (if any)," etc.) to "determine the extent of the foreign government's interest in the debt." *Id.* at 1123-1124.

Similarly, in *Allied Bank Int'l* v. *Banco Credito Agricola*, 757 F.2d 516, 521-522, cert. dismissed, 473 U.S. 934 (1985), the Second Circuit, after inquiring into whether the purported taking came to "complete fruition" in the foreign country, conducted a separate situs analysis, examining various incidents of the transaction (place of payment, place of negotiation, etc.), as well as the interests of the respective sovereigns in that transaction. And contrary to petitioners' assertion (Pet. 7, 8) that the courts of appeals had uniformly followed a "debtor-oriented" approach to these questions prior to the Ninth Circuit's decision in *Tchacosh*, the Second Circuit in *Allied Bank* concluded that the situs of the debt was at the *creditor's* location (New York), not that of the debtor-banks (Costa Rica). 757 F.2d at 522. Compare *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222, 224 (2d Cir. 1985) (finding situs of deposit in foreign country).

In sum, recent decisions suggest some willingness on the part of the courts of appeals, in appropriate circumstances, to eschew formulaic solutions to the situs issue in act of state cases in favor of an examination of the relationship between the parties' obligations and the foreign sovereign, as well as the interest of the foreign sovereign in application of the rule of decision embodied in its act of state. The earlier cases discussed above sought—somewhat in the manner of the First Restatement of Conflict of Laws—to identify "some single significant factor in [the] transaction" that would "identify the place * * * whose law should govern the transaction." See R. Leflar, L. McDougal & R. Felix, *American Conflicts Law* § 86, at 255 (1986). However, much as American conflict-of-laws principles have departed from strict adherence to territorially based "vested rights" theories in favor of an "interest analysis," as in the Second Restatement of Conflict of Laws (see R. Leflar, L. McDougal & R. Felix, *supra*, §§ 90-91, at 264-270), *Callejo* and *Allied Bank* ad-

dressed the territorial component of the act of state doctrine in a less rigid fashion; those more recent cases have instead sought to identify the state with the "most significant relationship" to the transaction at issue (R. Leflar, L. McDougal & R. Felix, *supra*, § 90, at 266-270). See Note, *supra*, 86 Colum. L. Rev. at 601-605.

d. We by no means suggest that the courts, in applying the act of state doctrine, should abandon concepts of territoriality in favor of an amorphous interest analysis patterned after modern conflict-of-laws principles. But we do believe that the interest analysis developed in the analogous conflict-of-laws context sheds light on the proper *application* of the territorial component of the act of state doctrine. In particular, consideration of the respective interests of the United States and Iran, as well as the underlying purposes of the act of state doctrine, support the court of appeals' decision not to apply a rigid, debtor-oriented rule in the circumstances of this case.

The court below rejected the argument that respondent's mere presence in the United States was sufficient to render the act of state doctrine inapplicable. The court noted that such a proposition would "greatly reduce the accepted scope of the act of state doctrine," since "[a] dispute between an Iranian corporation doing business entirely in Iran, and the government of Iran, could pop up in an American court merely because the corporation was owed some money by an American firm." Pet. App. 9a-10a. Moreover, the "American interest" in the parties' transactions here was "attenuated," since "all the services under the contract were to be performed in the foreign country," "all of the firm's assets and operations were there," *ibid.*, and payment was to be made primarily in rials through Iranian banks. Compare *Allied Bank*, 757 F.2d at 518-519, 521 (attaching significance to parties' agreement concerning place and manner of payment); *Braka*, 762 F.2d at 224-225 (same). Although the "United States has an independent concern with protecting property and transactions * * * within its borders," that "interest is not present here," because "[w]hat is at issue * * * is the propriety of dealings between the Iranian government and an Iranian corporation." Pet. App. 10a-11a. Because "all of the functional ele-

ments of the [parties'] relationship were centered in Iran," the court of appeals reasonably concluded that the territorial limitation did not preclude giving effect to the expropriation in this case. *Id.* at 11a, 25a-26a.

The decision below is consistent with the ruling by the Ninth Circuit on virtually identical facts in *Tchacosh*. There, all relevant aspects of the parties' transaction likewise were located in Iran, with the sole exception of the defendant-debtor's domicile. 766 F.2d at 1338. Under these circumstances, the court rejected the plaintiff's attempt to "localize" the debt in the United States, observing that in "no case" had "a court * * * refused to give effect to the acts of the foreign state" where "the nexus of the relevant relationship with a foreign country is so strong, and that with the United States so weak." *Ibid.* Looking instead to the policies underlying the act of state doctrine, the court concluded that "the relations between [plaintiff] and [defendant] have a far greater impact upon Iran than upon the United States." *Ibid.*[8]

e. Against this background, despite the somewhat varying verbal formulations used in some Second and Fifth Circuit cases, there is no circuit conflict on the territorial component of the act of state doctrine that warrants review by this Court. Three factors support this conclusion:

First, as respondent notes (Br. in Opp. 10-12), in the other act of state cases upon which petitioners rely (see Pet. 8-11), the transaction had a substantial nexus to the United States—and specifically to property physically located in the United States—*in addition to* the mere presence of the debtor-defendant. See *Bandes*, 852 F.2d at 664-665 (claims to funds present in United States as payment for United States goods ordered but not shipped to foreign country at time of expropriation); *United Bank*, 542 F.2d at 870-871 & n.2 (claim to funds held in United

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[8] In this case, unlike in *Tchacosh*, the agreement between the parties provided that it was governed by domestic (Illinois) rather than foreign law. See Pet. 2. We do not believe that contractual provision requires a different result here, since implementation of the contract occurred entirely in Iran and an agreement between private parties regarding the law that defines their contractual relationship does not in any event alter the power of a government (Iran) to take whatever property rights arise out of that relationship.

States to pay for goods shipped to United States prior to expropriation); *Menendez*, 485 F.2d at 1360, 1364, 1370 (claim of right to payment for goods shipped to United States prior to expropriation); *Tabacalera*, 392 F.2d at 707 (same); *Maltina*, 462 F.2d at 1028 (trademark registered in United States); *Republic of Iraq*, 353 F.2d at 51 (deposit in and stock held by United States bank).[9] By contrast, in *Tchacosh* and the instant case, the courts concluded that the only significant United States contact was the defendant's presence. 766 F.2d at 1338 & n.6; Pet. App. 9a-11a, 26a. Indeed, the court below distinguished *Bandes* and *United Bank* on these very grounds. *Id.* at 9a.

Second, specifically relying on the Fifth Circuit's decision in *Tabacalera*, the court of appeals in *Tchacosh* and the district court in the instant case both concluded that because all of the functional elements of the relationship were centered in Iran, the Iranian Government was in a position to "perform a *fait accompli*" concerning the payment or receipt of any money respondent owed the Consulting Firm. 766 F.2d at 1338; Pet. App. 26a. This obviously undermines petitioners' contention (Pet. 7, 9-10) that the result in this case and *Tchacosh* conflicts with *Tabacalera*.

Third, utilization of an "interest analysis"-type approach in the particular circumstances of *Allied Bank* and *Callejo* suggests that, contrary to petitioners' premise, the Second and Fifth Circuits might well agree with the result reached by the court below and the Ninth Circuit in *Tchacosh*. Following that approach in

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[9] Petitioners also rely (Pet. 9 n.7) on *Vishipco Line* v. *Chase Manhattan Bank*, 660 F.2d 854, 8612 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1982), but that case was not decided on act of state grounds. See U.S. Amicus Br. (at 10-14) in *Chase Manhattan Bank, N.A.* v. *Vishipco Line*, 459 U.S. 976 (1982). The Second Circuit held in *Vishipco* that a bank account in Citibank's Saigon branch "sprung" back to Citibank's home office in New York when Citibank closed the Saigon branch, prior to any seizure by local Vietnamese authorities. For the reasons stated in our amicus brief (at 26-27 & n.21) in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260 (May 29, 1990), that theory of liability in *Vishipco* is wrong. The closure of the branch in Saigon did not change the situs of the debt; rather, if the closure of the bank and the resulting refusal of a demand for payment were wrongful, the depositor had a cause of action for damages in New York for breach of contract. See *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 405 n.17 (1965) (Harlan, J., dissenting).

the circumstances of this case would be consistent with the purposes and rationale of the act of state doctrine because, as the court of appeals observed (Pet. App. 10a-11a), both international comity and the risk of offense to a foreign sovereign (and resulting interference with the conduct of foreign relations by the Executive Branch) weigh more heavily in favor of giving effect to the foreign sovereign act when the interests of the United States are attenuated and those of the foreign sovereign substantially predominate.

f. Finally, even if the "situs" issue petitioners raise might warrant review at some point, this is not the right case in which to address that issue. The district court concluded that because the Consulting Firm was entitled to receive payment from respondent only after respondent first received payment from Iran—and because respondent had not received payment from Iran at the time of the expropriation—the Consulting Firm's claim against respondent matured only *after* the expropriation. Pet. App. 27a. Whatever may be the proper "situs" of an ordinary breach-of-contract or unjust-enrichment claim, the courts below cannot be faulted for declining to hold that an unripe claim arising out of anticipated payment in Iran for services rendered in Iran by an Iranian company is somehow situated in the United States.

Moreover, recognizing that a rule looking only to whether the debtor is an American company would render the act of state doctrine "meaningless," petitioners apparently concede (Pet. 9; Reply Br. 4, 6) that the doctrine would bar their suit if respondent had assets in Iran at the time of the expropriation. Under petitioners' own theory, however, respondent *did* have assets in Iran at the time of the expropriation, because in their view the situs of a debt is the domicile of the debtor, and the situs of the debt that *Iran* owed *respondent* at that time therefore was in Iran. Indeed, Iran's power to decide whether to pay respondent the funds out of which the Consulting Firm would be paid, or to expropriate a portion of those funds, shows that Iran could exercise complete dominion over the Consulting Firm's contingent claim against respondent. At least in these unique circumstances, the court of appeals reasonably found that the expro-

priation of the Consulting Firm's claim (or respondent's debt) was complete in Iran.

2. Petitioners also urge (Pet. 17-20) the Court to grant certiorari to consider whether the courts below erred in not soliciting the views of the Executive Branch on the foreign relations impact of their suit before ordering it dismissed. But petitioners did not request the district court to solicit the views of the United States, and they requested the court of appeals to do so only after oral argument, first in a letter to the Clerk and then in their petition for rehearing. See Pet. 5; Br. in Opp. 9; Br. in Opp. App. 2a. Accordingly, it is not surprising that neither the panel opinion nor the order denying rehearing mentions the issue. Pet. App. 1a-11a, 13a. "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). Because there is no indication that the court below gave consideration on the merits to soliciting the views of the Executive Branch (as opposed to disregarding petitioners' requests on grounds of tardiness), the Court should deny review on this issue, especially now that the Court has cured whatever defect there might have been by inviting the Solicitor General to file this brief.

The premise of petitioners' submission on this point is mistaken in any event. In arguing that the Executive Branch's views should have been solicited, petitioners rely (Pet. 17, 19-20; Reply Br. 9-10) on the court of appeals' observation that it would be a "slap in the face of the Iranian regime" for a United States court to entertain this suit. Pet. App. 10a-11a. Petitioners apparently read the quoted phrase to constitute a particularized judicial determination that adjudication of this suit would adversely affect the foreign relations of the United States. If the decision of the court of appeals actually turned on a particularized assessment of the foreign policy interests of the United States in its relations with Iran, we would agree—in accordance with the submission in our amicus brief (at 32-33) in *Kirkpatrick*, quoted by petitioners (Pet. 19)--that a court should not undertake to determine such matters for itself and should

instead solicit and give great weight to the views of the Executive Branch. But we think petitioners read far too much into a single phrase in the court of appeals' opinion. In context, it is clear that the court intended the quoted phrase to be nothing more than the most immediate illustration of the comity and separation of powers concerns that underlie the act of state doctrine as a general matter. See Pet. App. 10a-11a. This Court took account of such concerns in *Sabbatino*, 376 U.S. at 428-436, and the court of appeals was not barred from doing so here.

In a related vein, petitioners urge (Pet. 18-19) the Court to adopt a "reverse-*Bernstein*" approach to act of state cases, under which a suit would not be barred unless the Executive Branch interposed an objection in the particular case.[10] Petitioners concede (Pet. 18-19; Reply Br. 9), however, that the Court in *Sabbatino* specifically rejected that approach (376 U.S. at 436) and that they are essentially asking the Court to overrule *Sabbatino* in this regard. Petitioners advance no reason why the Court should do so. Moreover, contrary to petitioners' contention (Pet. 19; Reply Br. 8), we did not urge the Court in *Kirkpatrick* to reconsider this holding in *Sabbatino* (see U.S. *Kirkpatrick* Br. at 31-32 & n.32)—which the United States supported in *Sabbatino* itself—and we do not do so here.

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[10] In *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954), as understood by this Court in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), the court of appeals recognized an exception to the act of state doctrine where the Executive Branch represented that application of the doctrine would not advance the interests of United States foreign policy. In *First National City Bank*, three Justices approved that approach. 406 U.S. at 768 (plurality opinion). Justice Powell, in his concurring opinion (*id.* at 773), and Justice Brennan, in his dissenting opinion for four Justices (*id.* at 776-777, 782-793), disapproved of a "*Bernstein* exception." See also *id.* at 773 (Douglas, J., concurring). Under a "reverse-*Bernstein*" approach, the court would have a duty to adjudicate in the absence of an Executive Branch representation that United States foreign policy interests would be adversely affected. See *Sabbatino*, 376 U.S. at 467-472 (White, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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